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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BARREN MAR THUNA,

Plaintiff,

vs.

PHILLIP J. KOHN, *et al.*,

Defendants.

Case No. 2:17-cv-02395-JAD-VCF

**ORDER AND REPORT AND
RECOMMENDATION**

APPLICATION TO PROCEED *IN FORMA PAUPERIS*
(EFC No. 4), COMPLAINT (EFC No. 1-1), AND
MOTION TO AMEND COMPLAINT (ECF No. 3)

Before the Court are Plaintiff Barren Thuna's application to proceed *in forma pauperis* (ECF No. 4), complaint (ECF No. 1-1), and motion to amend complaint (ECF No. 3). For the reasons stated below, Plaintiff's *in forma pauperis* application is granted. The Court grants Plaintiff's motion to amend and orders that the complaint be allowed to proceed. The Court also recommends that portions of Plaintiff's complaint be dismissed with prejudice.

DISCUSSION

Plaintiff's filings present two questions: (1) whether Plaintiff may proceed *in forma pauperis* under 28 U.S.C. § 1915(e) and (2) whether Plaintiff's complaint states a plausible claim for relief. Each is discussed below.

I. Whether Plaintiff May Proceed *In Forma Pauperis*

Plaintiff's application to proceed *in forma pauperis* is granted. Under 28 U.S.C. § 1915(a)(1), a plaintiff may bring a civil action "without prepayment of fees or security thereof" if the plaintiff submits a financial affidavit that demonstrates the plaintiff "is unable to pay such fees or give security therefor." According to Plaintiff's affidavit, he is incarcerated and does not receive money from any outside source

1 except for some money from his family. (ECF No. 4). Plaintiff's application to proceed *in forma pauperis*
2 is, therefore, granted.

3 **II. Whether Plaintiff's Complaint States a Plausible Claim**

4 **A. Plaintiff's Motion to Amend**

5 Under Fed. R. Civ. P. 15(a)(1), "[a] party may amend its pleading once as a matter of course within
6 21 days after serving it." Plaintiff's complaint has yet to be filed or served in this case, so Plaintiff may
7 amend his pleading as a matter of course. Therefore, Plaintiff's motion to amend is granted.

8 **B. Legal Standard for Reviewing the Complaint**

9 Because the Court grants Plaintiff's application to proceed *in forma pauperis*, it must review
10 Plaintiff's complaint to determine whether the complaint is frivolous, malicious, or fails to state a plausible
11 claim. 28 U.S.C. § 1915(e)(2)(B). Federal Rule of Civil Procedure 8(a) provides that a complaint "that
12 states a claim for relief" must contain "a short and plain statement of the claim showing that the [plaintiff]
13 is entitled to relief." The Supreme Court's decision in *Ashcroft v. Iqbal* states that to satisfy Rule 8's
14 requirements, a complaint's allegations must cross "the line from conceivable to plausible." 556 U.S.
15 662, 680 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, (2007)). The Court's
16 decisions in *Twombly* and *Iqbal* prescribe a two-step procedure to determine whether a complaint's
17 allegations cross that line.
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19 First, the Court must identify "the allegations in the complaint that are not entitled to the
20 assumption of truth." *Iqbal*, 556 U.S. at 680. Factual allegations are not entitled to the assumption of
21 truth if they are conclusory or "amount to nothing more than a 'formulaic recitation of the elements'" of
22 a claim. *Id.* at 681 (quoting *Twombly*, 550 U.S. at 555).

23 Second, the Court must determine whether the complaint states a "plausible" claim for relief.
24 *Iqbal*, 556 U.S. at 679. A claim is plausible if the factual allegations which are accepted as true "allow[]
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1 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at
2 678. If the factual allegation, which are accepted as true, “do not permit the Court to infer more than the
3 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is
4 entitled to relief.” *Id.* at 679 (citing Fed. R. Civ. P. 8(a)(2)).

5 “[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than
6 formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v.*
7 *Gamble*, 429 U.S. 97, 106 (1976)). If the Court dismisses a complaint under § 1915(e), the plaintiff should
8 be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from
9 the face of the complaint that the deficiencies could not be cured by amendment. *Cato v. United States*,
10 70 F.3d 1103, 1106 (9th Cir. 1995).

11 **C. Claims Against Attorneys from the Public Defender’s Office**

12 Plaintiff’s 42 U.S.C. § 1983 complaint alleges that the attorneys appointed to represent him in a
13 criminal case pending in Justice Court violated his First, Fifth, Sixth, and Eighth Amendment rights by
14 conspiring with the Judge and Clerk of Court to prevent Plaintiff from filing motions in his case. (ECF
15 No. 1-1 at 4-8). Specifically, Plaintiff asserts he has attempted to personally file motions in his case and
16 his appointed attorneys are “refusing to allow Mr. Thuna’s legal motions to be filed by the Clark County
17 Clerk of Courts and then further refusing to file them” on Plaintiff’s behalf. (*Id.* at 4). Plaintiff also argues
18 that EDCR 3.70, the rule preventing the Justice Court from accepting documents personally submitted by
19 a defendant that is represented by counsel, violates due process and “automatically violates cruel and
20 unusual punishment.” (*Id.* at 8-9).

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22 “Claims under § 1983 require the plaintiff to allege (1) the violation of a federally-protected right
23 by (2) a person or official who acts under the color of state law.” *Lopez v. Armstread*, No. 3:13-CV-
24 00294-MMD, 2015 WL 2194183, at *4 (D. Nev. May 11, 2015). The First Amendment prohibits
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1 government actions abridging the right of people to “petition the Government for a redress of grievances.”
2 U.S. CONST. amend. I. “The right of access to the courts is...one aspect of the right of petition.” *California*
3 *Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Under the Fifth Amendment,¹ “[n]o
4 person shall be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.
5 Criminal defendants are entitled to have the assistance of counsel. U.S. CONST. amend. VI. The Eighth
6 amendment prohibits cruel and unusual punishment. U.S. CONST. amend. VIII. “Although the Attorney
7 Defendants are themselves private actors, private parties who corruptly conspire with a judge in
8 conjunction with the judge's performance of an official judicial act are acting under color of state law for
9 the purpose of § 1983, even if the judge himself is immune from civil liability.” *Kimes v. Stone*, 84 F.3d
10 1121, 1126 (9th Cir. 1996).

11 On its face, Plaintiff's complaint states a plausible claim for relief against the attorneys from the
12 Public Defender's office. Plaintiff alleges these attorneys are conspiring with state officers to prevent
13 Plaintiff accessing the court and obtaining due process, effectively denying Plaintiff the assistance of
14 counsel and subjecting him to undue punishment, by enforcing an unconstitutional law and refusing to file
15 motions on behalf of Plaintiff. Therefore, Counts 1-3 may proceed against the attorneys from the Public
16 Defender's office.
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18 **D. Claims Against the Justice Court Judge**

19 Plaintiff asserts the same claims against the Justice Court Judge as he did against the attorneys
20 from the Public Defender's office. (ECF No. 1-1 at 4-8). Judges are “absolutely immune from §1983
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24 ¹ While the Fifth Amendment generally applies only to the actions of the federal government, *Lee v. City of Los Angeles*, 250
25 F.3d 668, 687 (9th Cir. 2001), there are circumstances where courts find the Fifth Amendment “applies to the States by virtue
of the Fourteenth Amendment,” *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010). For the purposes of screening this complaint,
the Court will address Plaintiff's due process claims as though they were brought pursuant to the Fourteenth Amendment.

1 damage liability for acts committed within their jurisdiction.”² *Miller v. Barilla*, 549 F.2d 648, 649 (9th
2 Cir. 1977) *overruled on other grounds by Glover v. Tower*, 700 F.2d 556 (9th Cir. 1983); *see also Pierson*
3 *v. Ray*, 386 U.S. 547, 553-55 (1967). While “judicial immunity is not a bar to prospective injunctive
4 relief,” *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984), in this case Plaintiff asks solely for monetary
5 damages. (ECF No. 1-1 at 12). Each of Plaintiff’s claims relate to acts within the Justice Court Judge’s
6 jurisdiction. Therefore, the Court recommends that Counts 1-3 against the Justice Court Judge be
7 dismissed with prejudice.

8 **E. Claims Against the Clerk of Court**

9 In Count 4, added by Plaintiff’s motion to amend, Plaintiff asserts the Clerk of Court violated
10 Plaintiff’s Firth and Fifth Amendment rights by impermissibly delaying the filing of Plaintiff’s motions
11 or transferring motions to incorrect destinations. (ECF No. 3-1). “Court clerks have absolute quasi-
12 judicial immunity from damages for civil rights violations when they perform tasks that are an integral
13 part of the judicial process” and do “not act in the clear absence of all jurisdiction.” *Mullis v. U.S. Bankr.*
14 *Court for Dist. of Nevada*, 828 F.2d 1385, 1390 (9th Cir. 1987). Each of Plaintiff’s claims relate to acts
15 within the Clerk of Court’s jurisdiction. Therefore, the Court recommends that Count 4 against the Clerk
16 of Court be dismissed with prejudice.

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18 Accordingly, and for good cause shown,

19 IT IS ORDERED that Plaintiff’s Application to Proceed *In Forma Pauperis* (ECF No. 4) is
20 GRANTED.

21 IT IS FURTHER ORDERED that Plaintiff’s Motion to Amend Complaint (ECF No. 3) is
22 GRANTED.

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25 ² “A clear absence of all jurisdiction means a clear lack of all subject matter jurisdiction,” such as a probate judge who tries a criminal case. *Mullis v. U.S. Bankr. Court for Dist. of Nevada*, 828 F.2d 1385, 1389 (9th Cir. 1987).

1 IT IS FURTHER ORDERED that the Clerk of Court shall file the Complaint (ECF No. 1-1) with
2 the amendment found in Plaintiff's Motion to Amend Complaint (ECF No. 3-1). The Clerk shall issue
3 summons to defendants Phillip J. Kohn, Quintin M. Dollente Jr., and Jeffrey S. Maningo, deliver the same
4 to the U.S. Marshal for service, and send blank copies of the USM-285 forms to Plaintiff.

5 IT IS FURTHER ORDERED that the Plaintiff shall have 20 days to furnish to the U.S. Marshal
6 the required USM-285 forms. Within 20 days after Plaintiff receives copies of the completed USM-285
7 forms from the U.S. Marshal, Plaintiff must file a notice with the Court identifying which defendants were
8 served and which were not served, if any. If the plaintiff wishes to have the U.S. Marshal attempt service
9 again on any unserved defendants, then a motion must be filed with the Court identifying the unserved
10 defendants, specifying a more detailed name and address, and indicating whether some other manner of
11 service should be used. Pursuant to the Federal Rules of Civil Procedure 4(m), service must be
12 accomplished within 90 days from the date the complaint was filed.

13 IT IS FURTHER ORDERED that from this point forward, Plaintiff will serve upon defendants, or
14 their attorney if they have retained one, a copy of every pleading, motion, or other document submitted
15 for consideration by the Court. Plaintiff shall include with the original paper submitted for filing a
16 certificate stating the date that a true and correct copy of the document was mailed to the defendants or
17 their counsel. The Court may disregard any paper received by a district judge, magistrate judge, or the
18 Clerk which fails to include a certificate of service.

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21 IT IS RECOMMENDED that Counts 1-3 against the Justice Court Judge and Count 4 of Plaintiff's
22 complaint be DISMISSED WITH PREJUDICE.
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NOTICE

Under Local Rule IB 3-2, any objection to this Order must be in writing and filed with the Clerk of the Court within 14 days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. (*See Thomas v. Arn*, 474 U.S. 140, 142 (1985)). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. (*See Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983)).

Pursuant to LSR 2-2, the Plaintiff must immediately file written notification with the court of any change of address. The notification must include proof of service upon each opposing party or the party's attorney. **Failure to comply with this Rule may result in dismissal of the action.** (*See* LSR 2-2).

IT IS SO ORDERED and RECOMMENDED.

DATED this 23rd day of October, 2017.



CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE